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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1154

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, **JAMES J. BROPHY, JOHN T. RETTALIATA**, and **MAYNARD P. VENEMA,**

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

Regarding Certiorari Policy:

Should this Court grant certiorari on the issue whether Petitioner's complaint states a cause of action under 42 U.S.C. §§ 1983 and 1985(3) when the decision appealed from is in accord with the well-established and consistent holdings of this Court?

Regarding the Merits:

1. Did the Court of Appeals for the Seventh Circuit err in affirming the dismissal of Count I of Petitioner's complaint on the grounds that the allegations contained in the complaint were insufficient to support a finding of "state action" for purposes of § 42 U.S.C. § 1983?

2. Did the Court of Appeals for the Seventh Circuit err in affirming the dismissal of Count II of Petitioner's complaint regarding the claim under 42 U.S.C. § 1985(3) on the grounds that the complaint failed to allege the deprivation of any federally protected right?

STATEMENT OF THE CASE

This case comes before this Court on a Petition for a Writ of Certiorari (hereinafter "Petition") from the decision of the Court of Appeals for the Seventh Circuit which affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division dismissing the complaint for failure to state a claim under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3).

The decisions of the District Court and the Court of Appeals are set forth at length in the Appendix to the Petition and shall be hereinafter cited by reference to such Appendix as "Petition App., pp. 1a-24a."

Petitioner, Dr. Helen A. Cohen, a female Assistant Professor (under contract of employment but without tenure) in the Department of Psychology and Education at the Illinois Institute of Technology (hereinafter "IIT"), was advised in March of 1971 that she would not be offered a tenured appointment as Associate Professor at IIT. Unwilling to remain in a non-tenured position, the Petitioner resigned.

Petitioner brought this action under 42 U.S.C. §§ 1983 and 1985(3), and under the Illinois Constitution through pendent jurisdiction. Her complaint alleged that IIT, a private university, and certain of its corporate officers, were acting under color of state law within the meaning of 42 U.S.C. § 1983, and were participating in a conspiracy prohibited by § 1985(3), in discriminating against her be-

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cause of her sex by not granting her tenure and by paying her less than the average salary of similarly situated males.

On motion of Respondents under Rule 12 of the Federal Rules of Civil Procedure, the District Court dismissed the complaint. The court held that Count I of the complaint, alleging a violation of § 1983, was insufficient because the complaint failed to allege state involvement in any of the discriminatory personnel practices of IIT (Petition App., p.21a). Count II, alleging a violation of § 1985(3), was dismissed for failure to allege state action and, in addition, because the policy determination by IIT and its executives did not constitute a "conspiracy by two or more separate individuals as distinguished from the 'collective judgment of two or more executives of the same firm' " (Petition App., p. 23a). The pendent jurisdiction count was accordingly dismissed.

The Court of Appeals unanimously affirmed the District Court, holding that the mere existence of detailed regulation of and financial support to a private entity does not make every act of the private entity an action of the state entitled to protection under § 1983 unless the state has approved of, participated in or lent support to the alleged acts of discrimination (Petition App., pp. 8a-10a). With respect to the § 1985(3) count, the Court of Appeals held that while state participation in or support for the conduct of the individual conspirators need not be alleged to state a cause of action under § 1985(3), the conspiracy must, nevertheless, deprive the plaintiff of a federally protected right. The Court held that if the rights sought to be vindicated are Fourteenth Amendment rights, they must be rights protected from impairment by a state (Petition App., pp. 12a-13a). The District Court's second ground for dismissal of the § 1985(3) count was not reached by the Court of Appeals in its decision affirming the ruling of the District Court (Petition App., p. 16a).

Petitioner subsequently filed with the Court of Appeals a petition for rehearing and a suggestion for hearing *en banc*, both of which were denied (Petition App., pp. 17a-18a).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

This Court should not grant the Petition because the decision of the court below is in accord with well-established precedent of this Court and is not in conflict with any other decision of this Court.

1.

The Decision Below is in Accord With The Decisions of This Court on What Constitutes State Action Under 42 U.S.C. § 1983

Petitioner has suggested that there exists a majority view (following the decisions of this Court) and a minority view (ascribed to the court below) defining the proper test to be used in determining what constitutes "state action" under 42 U.S.C. § 1983. She suggests that the giving of "significant" aid by the state to a private institution is sufficient state action, as a matter of law, to invoke § 1983. She denies that a nexus must exist between the state support and the challenged discriminatory policies (Petition, p. 10), and charges that this additional requirement is a test followed only by a minority of courts.

Respondents urge that the alleged conflicts between these "tests" are illusory, and that the decision of the Court of Appeals below follows the uniform holdings of this Court which have consistently required considerably greater involvement of the state in the discriminatory practices of a private institution than the Petitioner has alleged in her complaint.

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Petitioner would have this Court apply the test for "state action" described in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Respondents join in this request. In *Burton*, this Court found "state action" to exist when the facts showed sufficient "state participation and *involvement in discriminatory action* which it was the design of the Fourteenth Amendment to condemn." (italics supplied) 365 U.S. at 724. The Court specifically held as follows:

> "The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U.S. at 725.

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972), also cited by Petitioner, this Court restated the principle of *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967) that the state must have "significantly involved itself with invidious discriminations" of the private institution in order for the discriminatory action to fall within the ambit of constitutional prohibition. This Court in *Moose Lodge* found that the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board "does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." 407 U.S. at 177.

More recently, in *Jackson* v. *Metropolitan Edison Company*, 419 U.S. 345, 351 (1974), this Court required that there be "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

Despite the clear and consistently imposed requirement of state involvement in the alleged discrimination, either actively direct or passively by way of a symbiotic relationship, Petitioner insists no nexus is required for a finding of state action. This position is without support in the decisions of this Court.

Petitioner has attempted to distinguish *Burton* from *Moose Lodge* and *Jackson* on the grounds that the latter involve state regulation, not support. In doing so, Petitioner appears to ignore that a substantial portion of her complaint consists of allegations of state regulation, not support. In any event, these cases do not establish two distinct lines of precedent, one finding "state action" based on state financial aid and the other not. The only differences among these cases lie in the applicable facts. This Court has held repeatedly that: "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722 (1961); *Reitman* v. *Mulkey,* 387 U.S. 369, 378 (1967); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 172 (1972). The multitudinous factors of state involvement in the regulated utility industry were carefully set forth and analyzed in great detail in *Jackson* v. *Metropolitan Edison Company,* 419 U.S. 345, 349-59 (1974).

Nevertheless, contrary to the clear instructions of this Court, Petitioner here seeks to avoid the careful consideration of the factual allegations, and demands the promulgation of a new rule of law: whenever "significant" government aid is provided an employer, its actions are, *ipso facto,* state actions.

The court below performed no idle exercise in carefully analyzing each of the allegations of state involvement set

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forth in the complaint before determining that the allegations failed to establish any connection between the state support or state regulation and the challenged conduct of the Respondents. Four judges below considered each of the Petitioner's allegations concerning state action. Each of the four concluded that there was insufficient basis for a finding of state action.

Petitioner cites *Norwood* v. *Harrison*, 413 U.S. 455 (1973), for the proposition that the furnishing of state aid to private schools alone is sufficient to convert the private school's conduct into "state action." *Norwood*, however, involved an action to enjoin the enforcement of a state's textbook lending program. The question was not raised whether the state's own program of distribution constituted "state action," but only whether the distribution could properly be made to certain private as well as public schools.

Petitioner is asking this Court to abandon a well-established rule of law recognized by this Court on numerous occasions, and to substitute therefor a far less certain test of "state action". Petitioner would ask the Court to establish, as an automatic rule, that "significant" aid to a private employer by the state makes that employer a public employer, an arm of the state.

But what is "significant"? What shall be the legal standard? Is "significant" to mean "much" or "lots of" or "more than a mere scintilla of" or "that which is not insignificant?" Why should this Court adopt an undefined standard when a clear one exists which requires either state involvement in the challenged activity or a symbiotic relationship between the state and the private establishment. Under the current standard, the state must have so far "insinuated itself into a position of interdependence" with the private enterprise that it is a "joint participant" in the enterprise

(*Burton, supra,* 365 U.S. at 725); or the state must be "sufficiently connected with" the challenged activity to make the conduct of the private party "attributable to the State" (*Jackson, supra,* 419 U.S. at 358-9); or the state must have "significantly involved itself with invidious discriminations" (*Reitman, supra,* 387 U.S. at 380); or the state must be sufficiently implicated in the discriminatory policies of the private institution as to realistically be a "partner or even a joint venturer" in the private enterprise (*Moose Lodge, supra,* 407 U.S. at 177). The standard described by these cases is far more circumscribed than that which Petitioner would have this Court now adopt.

2.

The Decision Below is in Accord With Decisions of this Court in Finding that Petitioner Failed to Allege a Claim Upon Which Relief May Be Granted Under 42 U.S.C. § 1985(3)

Petitioner has argued that a claim for relief under 42 U.S.C. § 1985(3), alleging a conspiracy to deprive her of her civil rights because of her sex, does not require an allegation of "state action" (Petition, pp. 12-16).

This Court, in *Griffin* v. *Breckenridge,* 403 U.S. 88, 101 (1971), held that § 1985(3) could reach private conspiracies where racial discrimination is alleged. However, the specific constitutional sources of power relied on in *Griffin* were the Thirteenth Amendment and the Commerce Clause right of interstate travel. Since neither of these constitutional rights is a limitation on state power, no allegation of "state action" was required. However, where the Fourteenth Amendment forms the basis of a private cause of action under § 1985(3), as in the instant case, such Fourteenth Amendment rights may be secured only as against the action of the state. The *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 21, 30 (1885);

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Shelley v. *Kraemer*, 334 U.S. 1, 13 (1948); *Evans* v. *Newton*, 382 U.S. 296, 299-300 (1966); *United States* v. *Price*, 383 U.S. 787, 794, 799 (1966); *United States* v. *Guest*, 383 U.S. 745, 755 (1966).

Petitioner would have this Court interpret § 1985(3) as a general federal tort law, a result which this Court has expressly denounced in *Griffin*, *supra*, 403 U.S. at 101-2. Where sex discrimination is alleged, the private conspiracy must aim at a deprivation of equal enjoyment of rights secured by the Fourteenth Amendment, *i.e.*, protection from interference by the action of a state or protection from interference by private individuals at a state facility.

The language of the concurring and dissenting opinions in *United States* v. *Guest*, 383 U.S. 745 (1966) is not inapposite as Petitioner argues. While those opinions suggest that Section 5 of the Fourteenth Amendment empowers Congress to enact laws punishing all conspiracies which interfere with a Fourteenth Amendment right, the Fourteenth Amendment right referred to was "the right to equal utilization of *state facilities*." (Italics supplied) *United States* v. *Guest*, 383 U.S. at 761 and 777. The language in those separate opinions in *Guest* does not suggest that Section 5 of the Fourteenth Amendment could reach wholly private conspiracies to deprive an individual of the right to equal utilization of a *private* facility. State involvement is key to triggering the protection of the Fourteenth Amendment. The decision in *Guest* is consistent with the holding in *United States* v. *Price*, 383 U. S. 787, 799 (1966), decided by this Court on the same day, that the Fourteenth Amendment only protects against state action.

Members of this Court have indeed differed as to the scope of Section 5 of the Fourteenth Amendment. But not one member has suggested that it authorizes a general federal tort law. "As we have consistently held 'The Four-

teenth Amendment protects the individual against *state action*, not against wrongs done by individuals.' *Williams I*, 341 U.S. at 92 . . . ." *United States* v. *Price*, 38 U.S. 787, 799 (1966). In *United States* v. *Guest*, 383 U.S. 745 (1966), Mr. Justice Brennan stated that a majority of the members of this Court were expressing the view that Section 5 empowered Congress ". . . to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights . . . ." (383 U.S. at 782) But not one member of this Court has suggested that a private employer's alleged discrimination in determining whom he shall employ violates a Fourteenth Amendment right.

No matter how broadly the reach of Section 5 has been construed in the past, Petitioner's claim that all forms of private discrimination are thus made illegal is clearly unsupported.

The court below was correct in holding that while state participation *in the conspiracy* need not be alleged, the conspiracy must deprive Petitioner of a federally protected right which would attain "if IIT were a State university, or if the constitutional right of the plaintiff at stake were one that is entitled to protection against anyone, rather than merely protection from impairment by a state." (524 F.2d 818, at 828, Petition App., pp. 12a-13a). The decisions of this Court are not inconsistent. Because Petitioner has failed to allege any state involvement in the challenged action, the dismissal of her complaint was proper.

There is, therefore, no reason for this court to grant the Petition.

3.

Petitioner Has Other Remedies

Petitioner has argued extensively that if this Court fails to grant her Petition and sustain her appeal, she will have no effective remedy for the alleged discriminatory conduct (Petition, pp. 16-21). By her own admission, however, Petitioner has asserted that state court and federal agency claims are available to her. While she deprecates their utility, she does not deny their existence.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

E. Allan Kovar
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
Attorney for Respondent

Of Counsel:
Christopher B. Nelson
Schiff Hardin & Waite